

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
3
4 United States of America,
5 Plaintiff,
6 vs. Criminal Action No. 3:21-cr-49-2
7 Diana Toebbe,
8 Defendant.

11 Proceedings had in the Plea Hearing in the
12 above-styled action on February 18, 2022, before the Honorable
13 Robert W. Trumble, Magistrate Judge, at Martinsburg,
14 West Virginia.

APPEARANCES

16 | On behalf of the United States of America:

24 The defendant was present in person.

25 Proceedings reported by means of digital recording; transcript produced by computer-aided transcription.

APPEARANCES (Continued)

3 On behalf of the United States of America:

S. Derek Shugert, Esq.
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7 || On behalf of the defendant:

Edward B. MacMahon, Jr., Esq.
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1 (Digitally-recorded proceedings in open court.)

2 (February 18, 2022, 11:09 A.M.)

3 - - -

4 THE COURT: Good morning, everyone. Please be
5 seated.

6 All right. If the parties are ready to proceed, Chad,
7 would you call the case for me, please.

8 THE CLERK: Certainly. This is the case of the
9 United States of America versus Diana Toebbe, Criminal
10 Number 3:21-cr-49, defendant 2.

11 The government is represented by counsel, Jarod Douglas,
12 Jessica Smoler, Derek Shugert. The defendant is present in
13 person and by counsel, Barry Beck and Edward MacMahon.

14 Are the parties ready to proceed?

15 MR. DOUGLAS: The United States Government is ready,
16 Your Honor.

17 MR. MACMAHON: Ready for the defendant, Your Honor.
18 Good morning.

19 THE COURT: Good morning. Good morning. We're
20 scheduled this morning for a binding plea to an indictment.
21 And just a couple of housekeeping matters as we get started.
22 There may be persons or individuals from the public
23 participating in this hearing by virtue of Zoom electronic
24 communications. I warn those individuals to make sure that
25 their microphones are muted and that their video is off

1 throughout the course of this proceeding.

2 The second item of business is, Mr. Douglas, are you going
3 to be speaking on behalf of the government?

4 MR. DOUGLAS: Yes, Your Honor.

5 THE COURT: Mr. -- sir, are you going to be speaking
6 on behalf of the defendant in this case?

7 MR. MACMAHON: Yes, Your Honor. Edward MacMahon for
8 Ms. Toebbe.

9 THE COURT: All right, Mr. MacMahon. Thank you.

10 All right. If that's the case, Mr. MacMahon, it's my
11 understanding that Ms. Toebbe desires to plead guilty to the
12 charge contained in Count 1 of the original indictment; is that
13 correct, sir?

14 MR. MACMAHON: That is correct, Your Honor.

15 THE COURT: All right. Thank you.

16 Ms. Toebbe, would you please stand, raise your right hand,
17 and be sworn by the clerk.

18 (The defendant was sworn in.)

19 THE DEFENDANT: Yes.

20 THE CLERK: Thank you.

21 THE COURT: Thank you. Please be seated.

22 Ms. Toebbe, do you understand that you are under oath, and
23 if you answer any of my questions falsely, your answers may
24 later be used against you in another prosecution for perjury or
25 for making a false statement?

1 THE DEFENDANT: Yes.

2 THE COURT: Do you understand that if you lie, it may
3 result in a higher sentence for you?

4 THE DEFENDANT: Yes.

5 THE COURT: Now, during the course of this hearing,
6 I'm going to be asking you several questions. At any point,
7 you should feel free to ask questions, ask for an explanation
8 if you do not understand my question, or ask me to pause the
9 proceedings so that you may confer with your attorneys. Do you
10 understand?

11 THE DEFENDANT: Yes.

12 THE COURT: Would you state your full name for the
13 record, please.

14 THE DEFENDANT: Diana Smay Toebbe.

15 THE COURT: Ms. Toebbe, how old are you?

16 THE DEFENDANT: Forty-six.

17 THE COURT: And how much education have you had?

18 THE DEFENDANT: I have a Ph.D.

19 THE COURT: So you can read, write, and understand
20 English then?

21 THE DEFENDANT: Yes, sir.

22 THE COURT: All right. Have you recently been under
23 the care of a doctor, psychiatrist, or other medical
24 professional for any serious physical or mental illness,
25 including treatment for an addiction to drugs or alcohol?

1 THE DEFENDANT: Yes.

2 THE COURT: Does any of the treatment that you're
3 receiving affect your ability to understand what we're doing in
4 this proceeding today?

5 THE DEFENDANT: No.

6 THE COURT: Did it affect your ability to communicate
7 with your attorneys concerning the charges that were filed
8 against you?

9 THE DEFENDANT: No.

10 THE COURT: Did it affect your ability to understand
11 the terms and conditions as set forth in the plea offer offered
12 by the government in this case?

13 THE DEFENDANT: No.

14 THE COURT: Are you currently using any form of a
15 controlled substance or any medication or alcohol that might
16 affect your ability to understand this proceeding today?

17 THE DEFENDANT: No.

18 THE COURT: Mr. MacMahon, do you have any reason to
19 question the competence of Ms. Toebbe?

20 MR. MACMAHON: No, Your Honor.

21 THE COURT: All right. Thank you.

22 Ms. Toebbe, are you here today to enter a guilty plea as
23 part of a written plea agreement?

24 THE DEFENDANT: Yes.

25 THE COURT: Based on your responses, I find that you

1 are competent and capable of entering an informed plea.

2 Ms. Toebbe, my name is Robert Trumble. I'm the United
3 States Magistrate Judge. You are charged with a felony
4 offense. You have the right to have this plea taken by an
5 Article III judge, sometimes called a district judge. Only you
6 can give up that right, and I can only hear your plea if you
7 agree to it by signing a waiver.

8 Now, I have on my bench a waiver that appears to bear your
9 signature. So first of all, did you, in fact, sign this
10 waiver?

11 THE DEFENDANT: Yes, I did.

12 THE COURT: Did you discuss it with your attorneys
13 before you signed it?

14 THE DEFENDANT: Yes.

15 THE COURT: And you understand the purpose for the
16 waiver is to allow me to hear your plea today; is that correct?

17 THE DEFENDANT: Yes.

18 THE COURT: And you've agreed to it by signing it?

19 THE DEFENDANT: Yes.

20 THE COURT: Did anyone force or pressure you into
21 signing the waiver?

22 THE DEFENDANT: No.

23 THE COURT: Mr. MacMahon, do you -- is it your
24 understanding that your client agrees to the waiver, sir?

25 MR. MACMAHON: Yes, Your Honor.

1 THE COURT: All right. I find that the waiver has
2 been properly executed and direct that it be filed.

3 Ms. Toebbe, do you understand that you have the right to
4 be represented by counsel at every stage of these proceedings,
5 including your sentencing, and if you could not afford
6 counsel, you have a right to have counsel appointed on your
7 behalf?

8 THE DEFENDANT: Yes.

9 THE COURT: Mr. MacMahon, do you or any member of
10 your office or firm represent anyone, including codefendants,
11 who might be interested in the outcome of this matter?

12 MR. MACMAHON: No, Your Honor.

13 THE COURT: And, Mr. Beck, do you or any member of
14 your office or firm represent anyone, including codefendants,
15 who might be interested in the outcome of this matter?

16 MR. BECK: No, Your Honor.

17 THE COURT: All right. Thank you.

18 Ms. Toebbe, do you believe that you've had adequate time to
19 discuss your case fully with your attorneys, Mr. MacMahon and
20 Mr. Beck?

21 THE DEFENDANT: Yes.

22 THE COURT: Have they been able to answer your
23 questions about how best to proceed in this case?

24 THE DEFENDANT: Yes.

25 THE COURT: Is there anything your lawyers have not

1 done which you have asked them to do?

2 THE DEFENDANT: No.

3 THE COURT: Are you completely satisfied with the
4 legal advice that you've received from Mr. MacMahon and
5 Mr. Beck?

6 THE DEFENDANT: Yes.

7 THE COURT: Mr. MacMahon and Mr. Beck, I'll ask you
8 to respond to these questions.

9 During the time that you've represented Ms. Toebbe, has she
10 been cooperative with you?

11 MR. MACMAHON: She has, Your Honor.

12 MR. BECK: Yes, Your Honor.

13 THE COURT: Have you had adequate time to discover
14 the government's case?

15 MR. MACMAHON: Yes, Your Honor.

16 MR. BECK: Yes, Your Honor.

17 THE COURT: Have you had adequate time to consider
18 the possible defenses to the charge?

19 MR. MACMAHON: Yes, Your Honor.

20 MR. BECK: Yes, Your Honor.

21 THE COURT: Do you know of any viable defense to the
22 charge contained in Count 1 of the original indictment?

23 MR. MACMAHON: Your Honor, this being a conditional
24 plea, I would say that there are viable defenses to Count 1,
25 but they're all waived by this plea agreement, knowingly and

1 intelligently done so by Ms. Toebbe. But as the Court frames
2 the question, I would have to answer it that way.

3 THE COURT: Do you know of any absolute defense to
4 the charge contained in Count 1, sir?

5 MR. MACMAHON: No absolute defenses, Your Honor.

6 THE COURT: Mr. Beck?

7 MR. BECK: I agree, Your Honor, with Mr. MacMahon's
8 statement.

9 THE COURT: All right. Thank you.

10 Have you discussed all of those issues with your client?

11 MR. MACMAHON: Yes, of course, Your Honor.

12 MR. BECK: I have, Your Honor, yes.

13 THE COURT: All right. Thank you very much.

14 All right. We have a plea agreement in this case.

15 Mr. Douglas, would you summarize the contents of the plea
16 agreement for the Court.

17 MR. DOUGLAS: Yes, Your Honor.

18 Your Honor, I have here in my hands the original written
19 plea agreement between the parties. It's in letter format. It
20 is 8 pages, 19 paragraphs in length, and it is dated
21 February 15, 2022.

22 In the first paragraph, the defendant agrees to plead
23 guilty to Count 1 of the indictment.

24 The second paragraph informs her of the maximum statutory
25 penalties. Not more than life in prison, a fine of up to --

1 not more than 2,000 -- \$100,000, and a term of supervised
2 release of not more than 5 years.

3 That paragraph also informs her of the mandatory special
4 assessment of \$100 and that she might be required to pay the
5 costs of any incarceration.

6 Your Honor, because this is a binding plea, paragraph 3 is
7 the paragraph that sets forth the binding term that the parties
8 have agreed to which is a sentence of not more than 36 months
9 of imprisonment. The Court will, of course, still determine
10 the amount of supervised release and any fine. The parties
11 understand that the Court does -- if the Court does not accept
12 the binding provision, then Ms. Toebbe would have the right to
13 withdraw her plea of guilty.

14 On to paragraph 4. Even though this is a binding plea, we
15 still stipulate to the base offense level in this case which is
16 a base offense level of 37 because of the involvement of the
17 type of restricted data being classified at a confidential
18 level.

19 Paragraph 14 does reflect the parties' understanding that
20 if the Court -- that the Court is not bound by that particular
21 paragraph and that particular stipulation; and if the Court
22 does not accept it, then the defendant does not have the right
23 to withdraw her guilty plea.

24 Your Honor, paragraph 5 contains the parties' stipulation
25 as to the facts supporting this plea. I'm not going to go over

1 that in detail at this point in time because pursuant to the
2 parties' agreement, when we get to the factual basis, I will be
3 proffering that factual stipulation as the factual basis for
4 the plea.

5 Therefore, moving on to page 3, paragraph 6 contains what
6 we call the *Booker* waiver. The defendant waives her right to
7 have sentencing determinations made by a jury beyond a
8 reasonable doubt and instead submits that to the sentencing
9 judge by a preponderance of the evidence standard.

10 In paragraph 7, the defendant agrees to be completely
11 forthright and truthful of all questions made of her, including
12 sitting for a polygraph examination if requested to do so.
13 That paragraph then goes on to list the specific items. In
14 addition, that the defendant would agree to cooperate regarding
15 access to electronic devices and accounts, finding and
16 retrieving the \$100,000 that was paid as part of this case, and
17 assisting federal officials with locating any classified
18 information that is outstanding.

19 Paragraph 8 then provides the defendant with some limited
20 use immunity that goes along with that cooperation with an
21 exception of any evidence of crimes of violence. But it does
22 indicate that this agreement does not prevent the defendant
23 from being prosecuted for any violations of other federal and
24 state laws should such evidence be obtained from an independent
25 legitimate source separate and apart from any of that

1 cooperation and information. That paragraph concludes by
2 reflecting the defendant's understanding that she could still
3 be prosecuted for perjury or giving a false statement to a
4 federal agent if that would occur by virtue of her
5 cooperation.

6 Paragraph 9 reflects the defendant's understanding and
7 agreement that she shall not knowingly have contact with any
8 foreign government or agents thereof except with the written
9 and expressed permission of the FBI unless it's simply for
10 obtaining a foreign travel visa and that she shall not seek or
11 knowingly accept any benefit from any foreign country, and, if
12 she does, it's assigned to the United States.

13 Moving on to paragraph 10. It reflects the defendant's
14 knowing and voluntary waiver of any further or additional
15 discovery in this case and also her waiver of any pending
16 requests for discovery.

17 Moving on to page 5, paragraph 11. This paragraph
18 reflects the defendant's understanding and agreement that not
19 later than 30 days following her sentencing hearing, she will
20 return all of the discovery provided by the United States in
21 this case unless there's some exception granted from the
22 government.

23 Paragraph 12 reflects the defendant's agreement to forfeit
24 and abandon the specific items that are listed here in
25 paragraph 12 -- all papers, digital media, electronic devices

1 seized from her residence, her vehicles, and Mr. Toebbe's Naval
2 Reactors office in October of 2021.

3 In paragraph 13, the government agrees to advise the Court
4 of the defendant's forthrightness and truthfulness or fail to
5 be forthright and truthful and asks the Court to give it such
6 weight as it deems appropriate. In addition, the United States
7 agrees in this paragraph that it will move to dismiss Counts 2
8 and 3 of the indictment at her sentencing hearing as they
9 pertain to her.

10 While this is a binding plea agreement, paragraph 14
11 nevertheless contains some nonbinding recommendations that the
12 United States would make. First, a two-level reduction for
13 acceptance of responsibility; second, an additional one-level
14 reduction for timely acceptance of responsibility. That was
15 conditioned upon the defendant executing and returning this
16 plea agreement on or before 5:00 P.M. on February 17, 2022. I
17 can represent to the Court that it was so timely executed and
18 returned.

19 Paragraph 15 reflects the defendant's understanding that
20 if she fails to cooperate as promised, fails to make a
21 truthful debriefing, is found to be deceptive during any
22 polygraph, violates any provision of the plea agreement, the
23 United States will not be bound to make those recommendations
24 or take those actions and will have the right to revoke the
25 agreement.

1 Page 6, paragraph 16 contains the appellate and habeas
2 corpus waivers in this matter, all of which are conditioned
3 upon the Court sentencing the defendant pursuant to paragraph 3
4 of this agreement. In other words, to or under that binding
5 term.

6 Paragraph 16-A is the direct appellate waiver with regard
7 to the conviction, and that relates to any ground whatsoever
8 the conviction cannot be appealed.

9 16-B is a direct appellate waiver with regard to the
10 sentence. Again, for any reason whatsoever, and there's a list
11 of examples of reasons there.

12 16-C is the habeas corpus waiver that she waives any
13 challenge to her conviction or sentence pursuant to 28 U.S.C.
14 § 2255.

15 This paragraph does go on to indicate that, of course,
16 nothing in the paragraph acts as a bar to the defendant
17 perfecting any legal remedies she may otherwise have on appeal
18 or collateral attack with regard to ineffective assistance of
19 counsel or prosecutorial misconduct, but she does agree in this
20 agreement that there is currently no known evidence of either
21 of those types of claims.

22 In paragraph 17, the government reserves the right to
23 provide the Court and probation office with all information
24 with regard to defendant's background in preparation for the
25 presentence report and pre -- and for the sentence itself.

1 Paragraph 18 contains some provisions with regard to
2 agreements on the -- any monetary penalties. That they'll be
3 subject to immediate enforcement; that she would authorize our
4 office to look into her credit reports; that she would give us
5 financial information in a written statement if requested to do
6 so; that she will participate in the Bureau of Prisons Inmate
7 Financial Responsibility Program regardless of whether that's
8 ordered; and it reflects the understanding that any monetary
9 penalty can be submitted to the Treasury for offset.

10 Finally, on the final page, paragraph -- page 8, paragraph
11 19 simply reflects that the above 18 paragraphs I just
12 outlined, those constitute the entire agreement between the
13 parties, and there are no other agreements.

14 This plea agreement does appear to be signed by Ms. Toebbe
15 and Mr. MacMahon on every page, and I've signed it on behalf of
16 the U.S. attorney as well as our special assistant U.S.
17 attorney here and, in addition, the trial attorneys from the
18 Department of Justice.

19 THE COURT: Thank you, Mr. Douglas. Would you hand
20 the plea agreement to Mr. MacMahon.

21 MR. DOUGLAS: So tendered, Your Honor.

22 THE COURT: All right. Thank you.

23 Mr. MacMahon, did Mr. Douglas provide a fair summary of the
24 entire agreement, sir?

25 MR. MACMAHON: He did, Your Honor.

1 THE COURT: Ms. Toebbe, do you understand what this
2 agreement does?

3 THE DEFENDANT: Yes, Your Honor.

4 THE COURT: Do you understand what this agreement
5 requires of you?

6 THE DEFENDANT: Yes.

7 THE COURT: Do you have any questions about your plea
8 agreement?

9 THE DEFENDANT: No.

10 THE COURT: I'd like you to take a look at the plea
11 agreement that was just handed to your attorney. First of all,
12 just tell me how many pages are in that plea agreement.

13 THE DEFENDANT: Eight.

14 THE COURT: At the bottom of each page, there's a
15 signature line that appears to bear your signature.

16 THE DEFENDANT: Yes.

17 THE COURT: Ms. Toebbe, is that your signature at the
18 bottom of each page?

19 THE DEFENDANT: It is.

20 THE COURT: Ms. Toebbe, were each of the paragraphs
21 of the plea agreement discussed with you prior to your reaching
22 an agreement with the government?

23 THE DEFENDANT: Yes.

24 THE COURT: Now, do you understand that this is a
25 binding plea, meaning that you have agreed to be sentenced to

1 not more than 36 months of imprisonment?

2 THE DEFENDANT: Yes.

3 THE COURT: Do you also understand that because this
4 is a binding plea agreement, the sentencing court may accept
5 the plea agreement, reject it, or defer a decision until it has
6 reviewed the presentence report; and if the Court does not
7 accept the plea, you will have the right to withdraw your plea
8 of guilty?

9 THE DEFENDANT: Yes.

10 THE COURT: Do you understand that under our concept
11 known as relevant conduct, the Court may take into account any
12 conduct, circumstances, and injuries relevant to the crime to
13 which you are pleading guilty?

14 THE DEFENDANT: Yes.

15 THE COURT: Do you understand that under the terms of
16 the plea agreement, you and the government have stipulated and
17 agreed that the total relevant conduct of the defendant is a
18 base offense level of 37 pursuant to Section 2M3.1(a)(2)
19 because the offense involved the communication of restricted
20 data that was classified at the confidential level?

21 THE DEFENDANT: Yes.

22 THE COURT: Do you also understand that there are
23 other stipulations as contained in the plea agreement starting
24 with paragraph number 5 on page 2 and continuing onto page 3?
25 And I'd like you to take a look at those now, and I'd like you

1 to confirm that you have read each of those paragraphs and
2 agreed to the stipulations as set forth in paragraph 5.

3 THE DEFENDANT: Yes.

4 THE COURT: Do you understand that in your plea
5 agreement and pursuant to the terms of the plea agreement, you
6 and the government have agreed that you will provide access to
7 and consent to search all electronic devices and accounts
8 owned, possessed, and/or controlled by you and any files
9 contained therein?

10 THE DEFENDANT: Yes.

11 THE COURT: You also understand that pursuant to the
12 terms of the plea agreement, you and the government have agreed
13 that you will assist federal officials with locating all
14 classified information and restricted data in any form
15 possessed and/or controlled by you or contained in premises,
16 including electronic devices and accounts possessed and/or
17 controlled by you?

18 THE DEFENDANT: Yes.

19 THE COURT: Do you understand that under the terms of
20 the plea agreement, you and the government have agreed that you
21 shall not knowingly have any contact with any foreign
22 government or agents thereof except with the express written
23 permission of the FBI unless such contact is solely for the
24 purpose of obtaining a visa for foreign travel, entering and
25 departing a foreign country through customs control, or

1 otherwise related to lawful international travel; further, that
2 you shall not seek or knowingly accept personally or through
3 another person or entity any benefit from any foreign
4 government or agent thereof, and that such -- should such a
5 benefit be received by you or some person or entity on your
6 behalf, you will assign such benefit to the United States?

7 THE DEFENDANT: Yes.

8 THE COURT: Ms. Toebbe, does the written plea
9 agreement represent the complete agreement between you and the
10 government?

11 THE DEFENDANT: Yes.

12 THE COURT: Is there anything that you and the
13 government have agreed to that is not contained in that written
14 document?

15 THE DEFENDANT: No.

16 THE COURT: Ms. Toebbe, do you want me to accept the
17 plea agreement?

18 THE DEFENDANT: Yes.

19 THE COURT: I find the defendant, Ms. Toebbe,
20 understands and agrees with the terms contained in the plea
21 agreement. I order the original plea agreement be filed as
22 part of the record in this case.

23 Mr. MacMahon, would you tender the plea agreement to the
24 Court.

25 MR. MACMAHON: May I approach, Your Honor?

1 THE COURT: You may, sir. Thank you.

2 Ms. Toebbe, have you received a copy of the indictment
3 filed against you in this case?

4 THE DEFENDANT: Yes.

5 THE COURT: Have you had an opportunity to read the
6 original indictment?

7 THE DEFENDANT: Yes.

8 THE COURT: Would you like me to read the indictment
9 to you or will you waive reading of the original indictment in
10 open court?

11 THE DEFENDANT: I waive it.

12 THE COURT: All right. Thank you.

13 You are pleading to Count 1 of the original indictment
14 which charges you with conspiracy to communicate restricted
15 data in violation of Title 42, United States Code, Section
16 2274(a).

17 Ms. Toebbe, how do you plead to the charge contained in
18 Count 1 of the original indictment?

19 THE DEFENDANT: Guilty.

20 THE COURT: Now, before I accept your plea, I want to
21 make sure that there's a factual basis for your plea; that you
22 understand the nature of the charge against you and the
23 consequences of pleading guilty to that charge; that you
24 understand the constitutional and other legal rights you will
25 give up by pleading guilty; and that you are pleading guilty

1 voluntarily.

2 You are charged in Count 1 with conspiracy to communicate
3 restricted data in violation of Title 42, United States Code,
4 Section 2274(a). Now, Title 42, United States Code, Section
5 2274(a) states in its pertinent part as follows: "Whoever,
6 lawfully or unlawfully, having possession of, access to,
7 control over, or being entrusted with any document, writing,
8 sketch, photograph, plan, model, instrument, appliance, note,
9 or information involving or incorporating restricted data,
10 communicates, transmits, or discloses the same to any
11 individual or person, or attempts or conspires to do so -- to
12 do any of the foregoing, with the intent to injure the United
13 States or with the intent to secure an advantage to any foreign
14 nation, upon conviction thereof, shall be punished by
15 imprisonment for life, or by imprisonment for any term of years
16 or a fine of not more than \$100,000 or both."

17 Now, the term "restricted data" as defined in Title 42,
18 United States Code, Section 2014 means all data concerning
19 design, manufacturer, or utilization of atomic weapons; the
20 production of special nuclear material; or the use of special
21 nuclear material in the production of energy but shall not
22 include data declassified or removed from the restricted data
23 category pursuant to Section 2162 of this title.

24 Ms. Toebbe, do you understand the statute under which
25 you've been charged?

THE DEFENDANT: Yes.

2 THE COURT: Now, if the government had to go to trial
3 in this case, the government would have to prove the following
4 elements of Title 42, United States Code, Section 2274(a)
5 against you beyond a reasonable doubt: First, that you or
6 another person had possession of, access to, control over, or
7 entrusted with restricted data; second, that you or another
8 person agreed to communicate, transmit, or disclose the
9 restricted data to any individual or person with the intent to
10 injure the United States or to secure an advantage to any
11 foreign nation which agreement constitutes a conspiracy; and
12 third, that you knowingly and voluntarily participated in the
13 conspiracy; and fourth, that an overt act was committed in
14 furtherance of the conspiracy in the Northern District of
15 West Virginia.

16 Ms. Toebbe, do you understand the elements of the statute
17 under which you've been charged?

18 THE DEFENDANT: Yes.

22 THE DEFENDANT: Yes.

1 MR. DOUGLAS: Yes, Your Honor.

2 Your Honor, as previously stated, the parties have agreed
3 that the factual basis will be made pursuant to a proffer as
4 opposed to calling a witness. And specifically, Your Honor,
5 the government proffers paragraph 5 of the plea agreement as
6 the factual basis for this guilty plea which I'll summarize
7 now.

8 In the first paragraph under paragraph 5, it reflects the
9 defendant's agreement that she knowingly and voluntarily joined
10 a conspiracy with her husband, Jonathan Toebbe, to communicate
11 restricted data to another person with the intent to secure an
12 advantage to a foreign nation and that she thereafter committed
13 multiple overt acts in furtherance of the conspiracy, including
14 acting as a lookout while Mr. Toebbe serviced three dead drops
15 as is then described in paragraph 5. The first of which was on
16 June 26, 2021, in Jefferson County, West Virginia, which is, of
17 course, in the Northern District of West Virginia for venue
18 purposes; the second was on July 31, 2021, in south-central
19 Pennsylvania; and the third is on the next page, page 3, was on
20 October 9, 2021, in Jefferson County, West Virginia, which is
21 also another basis for the venue for this case.

22 The only other paragraph within paragraph 5 is the
23 paragraph regarding the eastern Virginia dead drop which the
24 defendant did not attend. However, there was a message passed
25 by Mr. Toebbe at that dead drop where he mentions one other

1 person knowing of the relationship that he believed he had with
2 COUNTRY1. That is agreed to and offered as additional factual
3 basis for the knowledge requirement of the defendant in
4 committing this offense.

5 THE COURT: Thank you, Mr. Douglas.

6 Mr. MacMahon, do you have any objection to the government's
7 proffer?

8 MR. MACMAHON: No, Your Honor.

9 THE COURT: Ms. Toebbe, do you have any objection to
10 the government's proffer?

11 THE DEFENDANT: No, Your Honor.

12 THE COURT: Ms. Toebbe, is the evidence the
13 government attorney just presented substantially correct?

14 THE DEFENDANT: Yes, Your Honor.

15 THE COURT: Did the government's proffer accurately
16 reflect your involvement in what occurred?

17 THE DEFENDANT: Yes.

18 THE COURT: All right. Ms. Toebbe, you need to
19 explain to me what you did that makes you guilty of conspiracy
20 to communicate restricted data in violation of Title 42, United
21 States Code, Section 2274(a).

22 THE DEFENDANT: At some point during the charged
23 period, knowingly and voluntarily joined a conspiracy with my
24 husband, Jonathan Toebbe, to communicate restricted data to
25 another person or nation not entitled to see it with the intent

1 to secure for that nation an advantage and committed multiple
2 overt acts in furtherance of the conspiracy, including acting
3 as a lookout while my husband made three drops of restricted
4 data. At least two of those acts were committed in this
5 district.

6 In or about December of 2021, I became aware that my
7 husband was attempting to sell to an unknown foreign nation
8 sensitive information that he had illegally taken from his job
9 with the Navy. As stated above, I thereafter acted as a
10 lookout for him when he attempted to drop that information to
11 the foreign nation or their representatives.

12 THE COURT: And these overt acts and this knowledge
13 of the restricted data and the attempt to transmit it to a
14 foreign nation, these acts occurred from on or about April 1,
15 2020, through on or about October 9, 2021, at or near Jefferson
16 County in the Northern District of West Virginia as it relates
17 to this conspiracy?

18 THE DEFENDANT: Yes.

19 THE COURT: Mr. MacMahon, are you satisfied, again,
20 sir, that if this case went to trial, there would be no
21 meritorious legal defense to the charge?

22 MR. MACMAHON: Yes, Your Honor.

23 THE COURT: And are you satisfied that Ms. Toebbe's
24 constitutional and other rights have been observed fully?

25 MR. MACMAHON: Yes, Your Honor.

1 THE COURT: And do you concur in her now-stated
2 intention to enter a plea of guilty to this charge?

3 MR. MACMAHON: I do, Your Honor.

4 THE COURT: And to the extent that I need to,
5 Mr. Beck, do you agree to Mr. MacMahon?

6 MR. BECK: I do as well, Your Honor.

7 THE COURT: All right. Thank you.

8 All right, Ms. Toebbe, I find that there is a sufficient
9 factual basis for your plea of guilty.

10 Now, Ms. Toebbe, do you understand that you are pleading
11 guilty to a felony offense; and if your plea is accepted,
12 you'll be adjudged guilty of that felony offense?

13 THE DEFENDANT: Yes.

14 THE COURT: And do you also understand that such
15 judgment may deprive you of valuable civil rights such as your
16 right to vote, your right to hold public office, your right to
17 serve on a jury, and your right to possess a firearm or gun of
18 any kind?

19 THE DEFENDANT: Yes.

20 THE COURT: Now, I understand that this is a binding
21 plea, but do you understand the statutory penalties that you
22 are facing as a result of this charge?

23 THE DEFENDANT: Yes.

24 THE COURT: Then you understand that you expose
25 yourself to a maximum penalty of imprisonment for a term of not

1 more than life; a fine of not more than \$100,000; and a term of
2 supervised release of not more than 5 years?

3 THE DEFENDANT: Yes.

4 THE COURT: Mr. Douglas, is there a mandatory minimum
5 component of the sentence that the defendant exposes herself
6 to?

7 MR. DOUGLAS: No, Your Honor.

8 THE COURT: All right. Thank you.

9 Now, Ms. Toebbe, do you understand that supervised release
10 means that after imprisonment, you'll be supervised by the
11 probation office under conditions that will be set by this
12 Court?

13 THE DEFENDANT: Yes.

14 THE COURT: And do you understand that if you violate
15 the terms of your supervised release, the Court may revoke the
16 term of your supervised release and order you to serve a term
17 in prison?

18 THE DEFENDANT: Yes.

19 THE COURT: Do you understand that you'll be required
20 to pay a special assessment of \$100 for having been convicted
21 of a felony offense?

22 THE DEFENDANT: Yes.

23 THE COURT: Do you understand that you've agreed as a
24 condition of your plea agreement to pay this special assessment
25 before the date of sentencing?

1 THE DEFENDANT: Yes.

2 THE COURT: Do you understand that as part of your
3 fine, you could be required to pay the cost of incarceration
4 and/or the cost of supervision upon release?

5 THE DEFENDANT: Yes.

6 THE COURT: Have you discussed those costs with your
7 attorneys?

8 THE DEFENDANT: Yes.

9 THE COURT: Then you understand that it now costs
10 \$3,688 per month per person for prison; \$371 per month per
11 person for supervised release; and \$2,980 per month per person
12 for a residential reentry center?

13 THE DEFENDANT: Yes.

14 THE COURT: Ms. Toebbe, do you understand that the
15 Court has the authority to order restitution in your case?

16 THE DEFENDANT: Yes.

17 THE COURT: And do you understand that the government
18 may seek forfeiture in your case?

19 THE DEFENDANT: Yes.

20 THE COURT: Do you understand that the forfeiture of
21 certain assets is part of the sentence that may be imposed in
22 your case?

23 THE DEFENDANT: Yes.

24 THE COURT: Do you understand that as part of your
25 plea agreement, you've agreed to forfeit and abandon to the

1 United States all of your right, title, and interest in the
2 following items that you agree constitute money, property,
3 and/or assets derived from or obtained by you as a result of or
4 used to facilitate the commission of your illegal activities,
5 being all papers, digital media, and electronic devices seized
6 from your residence, your vehicles, and Mr. Toebbe's Naval
7 Reactor's offices in October of 2021?

8 THE DEFENDANT: Yes.

9 THE COURT: In addition, do you understand that
10 you've agreed to assist federal officials with locating and
11 retrieving the \$100,000 which the FBI paid to you via Monero
12 cryptocurrency in exchange for restricted data; in this regard,
13 you voluntarily abandon all right, title, and interest and
14 claim to the \$100,000?

15 THE DEFENDANT: Yes.

16 THE COURT: Ms. Toebbe, do you understand that by
17 pleading guilty, if you are not a citizen of the United States,
18 you may be removed from the United States, denied citizenship,
19 and denied admission to the United States in the future?

20 THE DEFENDANT: Yes.

21 THE COURT: Now, do you understand that even though
22 this is a binding plea, the sentencing guidelines may still
23 play a role in your case because the Court can only accept a
24 plea agreement containing a specific sentence if it determines
25 that the sentence is appropriate under the U.S. Sentencing

1 Guidelines?

2 THE DEFENDANT: Yes.

3 THE COURT: Have you and -- have you and your
4 attorneys discussed the application of the sentencing
5 guidelines to your case?

6 THE DEFENDANT: Yes.

7 THE COURT: Do you understand that the Court may
8 defer deciding whether to accept the plea agreement in your
9 case until after the presentence report has been completed?

10 THE DEFENDANT: Yes.

11 THE COURT: Do you understand that both you and the
12 government will have an opportunity to object to the
13 presentence report?

14 THE DEFENDANT: Yes.

15 THE COURT: Do you understand that parole has been
16 abolished, and that you will not be -- and that if you are
17 sentenced to prison, you will not be released on parole?

18 THE DEFENDANT: Yes.

19 THE COURT: Now, do you understand that in your plea
20 agreement, you've waived any right to have sentencing
21 determinations made by a jury and for a jury to determine any
22 and all facts relevant to the application of the guidelines in
23 conformity with the Supreme Court case of *United States v.*
24 *Booker*?

25 THE DEFENDANT: Yes.

1 THE COURT: You also understand that you agreed for
2 the United States district judge to determine any and all facts
3 and to make a resolution of the application of any and all
4 guideline factors?

5 THE DEFENDANT: Yes.

6 THE COURT: You also understand that you agreed that
7 the district judge should make any sentencing determinations,
8 including, but not limited to, guideline determinations using
9 the preponderance of the evidence standard?

10 THE DEFENDANT: Yes.

11 THE COURT: Now, Ms. Toebbe, do you understand that
12 in your plea agreement, provided the Court accepts the binding
13 plea, that you've agreed to give up your right to appeal your
14 sentence under many circumstances?

15 THE DEFENDANT: Yes.

16 THE COURT: Ms. Toebbe, everyone found guilty of a
17 crime in federal court has the right -- in this district has
18 the right to appeal their conviction and sentence to the Fourth
19 Circuit Court of Appeals in Richmond, Virginia. In Richmond, a
20 three-judge panel reviews the conviction and sentence to see if
21 it was done correctly.

22 Do you understand that pursuant to the terms of paragraph
23 16-A of your plea agreement that you have knowingly waived all
24 right pursuant to Title 28, United States Code, Section 1291 or
25 any other statute or constitutional provision to appeal your

1 conviction on any ground whatsoever; this includes a waiver of
2 your right to appeal your conviction on the ground that the
3 statute to which you are pleading guilty is unconstitutional or
4 on the ground that the admitted conduct does not fall within
5 the scope of the statute?

6 THE DEFENDANT: Yes.

7 THE COURT: Do you understand that pursuant to the
8 terms of paragraph 16-B of your plea agreement that you have
9 knowingly and expressly waived all rights conferred by Title
10 18, United States Code, Section 3742 to appeal whatever
11 sentence is imposed, including any fine, term of supervised
12 release, or order of restitution for any reason, including the
13 establishment of the advisory sentencing guideline range, the
14 determination of your criminal history, the weighing of the
15 sentencing factors, and any constitutional challenges to the
16 calculation and imposition of any term of imprisonment, fine,
17 order of forfeiture, order of restitution, and term or
18 condition of supervised release?

19 THE DEFENDANT: Yes.

20 THE COURT: Do you understand that you only have the
21 right to appeal your guilty plea if you believe it was unlawful
22 or involuntary or that there was some other fundamental defect
23 in the proceeding that was not waived in the plea agreement
24 itself?

25 THE DEFENDANT: Yes.

1 THE COURT: However, you agree that your guilty plea
2 today is lawful and voluntary and that there has been no
3 fundamental defect in the proceedings that you're aware of; is
4 that correct?

5 THE DEFENDANT: Yes.

6 THE COURT: Do you also understand that everyone has
7 the right to challenge their conviction or sentence or the
8 manner in which it was determined in a post-conviction
9 proceeding, sometimes called a habeas corpus petition or
10 collateral attack, under Title 28, United States Code, Section
11 2255?

12 THE DEFENDANT: Yes.

13 THE COURT: Do you understand that pursuant to the
14 terms of paragraph 16-C of your plea agreement that you have
15 knowingly waived your right to challenge the conviction or the
16 sentence which is within the maximum provided in the statute of
17 conviction or the manner in which it was determined in any
18 post-conviction proceeding, including any proceeding under
19 Title 28, United States Code, Section 2255?

20 THE DEFENDANT: Yes.

21 THE COURT: Do you understand that your only
22 legal remedies on appeal or collateral attack are for claims
23 of ineffective assistance of counsel or prosecutorial
24 misconduct?

25 THE DEFENDANT: Yes.

1 THE COURT: However, you agree that there is
2 currently no known evidence of ineffective assistance of
3 counsel or prosecutorial misconduct; is that correct?

4 THE DEFENDANT: Yes.

5 THE COURT: Ms. Toebbe, have you discussed the waiver
6 of these important appellate rights with your attorneys?

7 THE DEFENDANT: Yes.

8 THE COURT: Having done so, do you still wish to
9 waive these rights?

10 THE DEFENDANT: Yes.

11 THE COURT: Mr. MacMahon, do you believe that the
12 defendant fully understands the importance of the rights she is
13 waiving, sir?

14 MR. MACMAHON: Yes, I do, Your Honor.

15 THE COURT: Now, Ms. Toebbe, do you understand that
16 should you find some basis on which to file an appeal, with few
17 exceptions, any notice of an appeal must be filed within 14
18 days of judgment being entered in your case?

19 THE DEFENDANT: Yes.

20 THE COURT: Based on your responses, Ms. Toebbe, I
21 find that you understand the nature of the charge and the
22 consequences of a guilty plea to the charge.

23 Now, Ms. Toebbe, do you understand that you have the right
24 to continue to plead not guilty to the charge?

25 THE DEFENDANT: Yes.

1 THE COURT: Do you understand that by pleading
2 guilty, you give up your right to a speedy and public trial by
3 jury?

4 THE DEFENDANT: Yes.

5 THE COURT: Do you also understand that by pleading
6 guilty, you give up your right to force the government to come
7 forward with witnesses and evidence against you?

8 THE DEFENDANT: Yes.

9 THE COURT: Do you understand that you would have
10 been presumed innocent until the government presented enough
11 evidence to satisfy both the judge and a jury beyond a
12 reasonable doubt of your guilt?

13 THE DEFENDANT: Yes.

14 THE COURT: Do you understand that when you admit
15 your guilt as you have here, you relieve the government of the
16 burden of proving your guilt?

17 THE DEFENDANT: Yes.

18 THE COURT: Do you understand that you would have had
19 the right to the assistance of counsel at trial?

20 THE DEFENDANT: Yes.

21 THE COURT: Do you understand that you and your
22 attorneys would have had the right to confront and cross
23 examine your accusers and to test the truth of what they
24 said?

25 THE DEFENDANT: Yes.

1 THE COURT: Do you understand that by pleading
2 guilty, you give up that right?

3 THE DEFENDANT: Yes.

4 THE COURT: Do you understand that had you desired to
5 go to trial and wished to call witnesses that you would have
6 been entitled to the services of the U.S. Marshal to bring
7 witnesses to court under subpoena?

8 THE DEFENDANT: Yes.

9 THE COURT: Do you understand that by pleading
10 guilty, you give up your right to call witnesses except at your
11 sentencing hearing?

12 THE DEFENDANT: Yes.

13 THE COURT: Do you understand that you would have had
14 the right to move to suppress or keep away from the jury's
15 hearing or consideration any evidence of any nature that had
16 been illegally or unlawfully obtained?

17 THE DEFENDANT: Yes.

18 THE COURT: Do you understand that had you desired to
19 go to trial that you would have had the right to testify at
20 trial?

21 THE DEFENDANT: Yes.

22 THE COURT: However, you understand that you could
23 not have been compelled or forced to testify at trial?

24 THE DEFENDANT: Yes.

25 THE COURT: Do you understand that you'd have had the

1 right to go to trial and remain silent; that is, not take the
2 witness stand or call any witnesses or present any evidence
3 whatsoever on your own behalf?

4 THE DEFENDANT: Yes.

5 THE COURT: Do you understand that the Court would
6 have instructed the jury that they could not convict you
7 because you'd exercised your constitutional right to remain
8 silent but could only base their decision on an offer of proof
9 from the government?

10 THE DEFENDANT: Yes.

11 THE COURT: Do you understand that you give up your
12 right to a unanimous verdict from a jury?

13 THE DEFENDANT: Yes.

14 THE COURT: Mr. MacMahon, do you believe that the
15 defendant understands the consequences of her guilty plea?

16 MR. MACMAHON: Yes, Your Honor.

17 THE COURT: Thank you.

18 Ms. Toebbe, I find that you understand the constitutional
19 and other legal rights you are giving up by pleading guilty.

20 Now, Ms. Toebbe, knowing all of those things, do you still
21 wish to plead guilty at this time?

22 THE DEFENDANT: Yes.

23 THE COURT: Has any person forced you, threatened
24 you, coerced you, intimidated you, or talked you into entering
25 a guilty plea against your will?

1 THE DEFENDANT: No.

2 THE COURT: Are you acting voluntarily and of your
3 own free will in entering this guilty plea?

4 THE DEFENDANT: Yes.

5 THE COURT: Ms. Toebbe, are you pleading guilty
6 because you are guilty of the crime charged in Count 1 of the
7 original indictment?

8 THE DEFENDANT: Yes.

9 THE COURT: Ms. Toebbe, has anyone promised you or
10 told you something that is different from what I've told you
11 today to get you to plead guilty?

12 THE DEFENDANT: No.

16 THE DEFENDANT: No.

17 THE COURT: Are you pleading guilty to protect
18 anyone?

19 THE DEFENDANT: No.

20 THE COURT: Has anyone promised or predicted the
21 exact sentence which will be imposed upon you in this matter?

22 THE DEFENDANT: No.

23 THE COURT: Do you understand that at this time, no
24 one could know the exact sentence which will be imposed in your
25 case?

1 THE DEFENDANT: Yes.

2 THE COURT: Ms. Toebbe, have you been able to fully
3 understand what is going on in these proceedings today?

4 THE DEFENDANT: Yes.

5 THE COURT: All right. Thank you. Based on your
6 responses, I find that your guilty plea is voluntary.

7 Now, again, at this time, do you have any questions or
8 second thoughts about entering a plea of guilty to this
9 charge?

10 THE DEFENDANT: No, Your Honor.

11 THE COURT: Would you please stand for me.

12 How do you plead to Count 1 of the original indictment
13 charging you with conspiracy to communicate restricted data?

14 THE DEFENDANT: Guilty.

15 THE COURT: Thank you. Please be seated.

16 In the case of the United States versus Diana Toebbe, I
17 find that Ms. Toebbe is fully competent and capable of entering
18 into an informed plea. I find that there is a sufficient
19 factual basis for her plea of guilty. I find that Ms. Toebbe
20 understands the nature of the charge and the consequences of a
21 guilty plea to the charge. I find that Ms. Toebbe understands
22 the constitutional and other legal rights she is giving up
23 because of her plea, and I find that Ms. Toebbe's plea is
24 voluntary.

25 While I defer accepting the terms of the plea agreement and

1 adjudging the defendant guilty to the sentencing court, I do
2 accept the plea of guilty to Count 1 of the original
3 indictment.

4 Ms. Toebbe, the sentencing court must consider the
5 following factors when determining the sentence that you will
6 receive: The nature and circumstances of the offense; your
7 history and characteristics; the necessity of punishing you,
8 deterring you, protecting the public from you or providing you
9 with training, medical care, or other treatment; the kinds of
10 sentences and sentencing range established by the sentencing
11 guidelines; the need to give defendants with similar criminal
12 records similar sentences; and the need to provide restitution
13 to any victims of the offense.

14 In order to help the sentencing court consider these
15 factors, the probation office is required to conduct a
16 presentence investigation of you and submit a report to the
17 sentencing court. I strongly encourage you to discuss this
18 process and your participation in the same as the information
19 in this report might have an impact on the sentence you
20 ultimately receive.

21 Understand that you must not commit any crimes between now
22 and sentencing because there are additional punishments that
23 may be imposed for committing additional crimes. Do you
24 understand?

25 THE DEFENDANT: Yes.

1 THE COURT: Pursuant to Section 6A1 of the United
2 States Sentencing Guidelines, I order the probation office to
3 conduct a presentence investigation of Ms. Toebbe, prepare a
4 draft presentence investigation report, and disclose its
5 contents to the government and Ms. Toebbe. I further direct
6 the probation officer and all parties comply with Federal Rule
7 of Criminal Procedure 32 and U.S. Sentencing Guideline Section
8 6A1.2 regarding deadlines for disclosure, objection, departure
9 motion, or sentencing statement and requirements. The
10 sentencing court will set this matter for sentencing following
11 the receipt of the presentence report.

12 Mr. MacMahon, Mr. Douglas, if either of you anticipate a
13 lengthy sentencing hearing, please notify the sentencing court
14 in advance so that an adequate amount of time can be set aside
15 for that hearing. And I just note that Judge Groh is normally
16 setting sentencings for about 45 minutes so if you anticipate a
17 longer period of time, I would encourage you to contact her
18 chambers and seek additional time.

19 MR. DOUGLAS: Yes, Your Honor.

20 MR. MACMAHON: Yes, Your Honor.

21 THE COURT: All right. Counsel, anything further we
22 need to address before we adjourn today?

23 MR. DOUGLAS: Not on behalf of the government, Your
24 Honor.

25 MR. MACMAHON: Nothing for the defendant, Your Honor.

1 THE COURT: All right. With that in mind, thank you.
2 The defendant is hereby remanded to the custody of the U.S.
3 Marshals Service, and we stand adjourned.

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5 (Hearing concluded at 11:49 A.M.)

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CERTIFICATE

3 I, Kate A. Slayden, Registered Professional Reporter
4 and Official Court Reporter of the United States District Court
5 for the Northern District of West Virginia, do hereby certify
6 that the foregoing is a true and correct transcript to the best
7 of my ability of the digitally-recorded proceedings had in the
8 above-styled action on February 18, 2022, as transcribed by me.

9 I certify that the transcript fees and format comply
10 with those prescribed by the Court and Judicial Conference of
11 the United States.

Given under my hand this 6th day of December 2022.

/s/Kate A. Slayden

Kate A. Slayden, RPR, CCR
Official Reporter, United States
District Court for the Northern
District of West Virginia